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FILED
FEB
Clerk, Supreme

In the

Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff and Respondent,

vs.

GORDON S. LITTLE,
Defendant and Appellant.

Case No.
8421

BRIEF OF RESPONDENT

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In the
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STATE OF UTAH,
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GORDON S. LITTLE,
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Case No. 8421

BRIEF OF RESPONDENT

STATEMENT OF FACTS

Shortly after 3:00 a. m. on January 31, 1955, Theurer's Store at Richmond, Utah, was broken and entered and merchandise of a value from two to four hundred dollars purloined. The defendant and one Haskins were arrested some twenty-two hours later in Twin Falls, Idaho, at the request of Utah law enforcement officials and held by the police of that city for extradition. The defendant was

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returned to Utah, charged in two counts with second degree burglary and grand larceny, convicted of both offenses in the First Judicial District Court and sentenced from one to twenty years on count one and one to ten years on count two. He appeals from these convictions.

STATEMENT OF POINTS

POINT I

THE STATE PRODUCED ABUNDANT AND CONVINCING EVIDENCE AT THE TRIAL WHICH SUPPORTS THE VERDICT OF GUILTY ON EACH COUNT OF THE INFORMATION.

POINT II

THE DEFENDANT WAS NOT DENIED DUE PROCESS OF LAW.

POINT III

UTAH CODE ANNOTATED, 1953, SECTION 76-38-1, UNDER WHICH THE DEFENDANT WAS CONVICTED OF GRAND LARCENY, IS NOT UNCONSTITUTIONAL.

ARGUMENT

POINT I

THE STATE PRODUCED ABUNDANT AND CONVINCING EVIDENCE AT THE TRIAL

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WHICH SUPPORTS THE VERDICT OF GUILTY ON EACH COUNT OF THE INFORMATION.

Mark Theurer, of Richmond, Utah, was the owner of the burglarized store and the merchandise stolen therefrom. He testified that he was summoned to his store at about 3:00 a. m. on January 31, 1955; that he found the cash register had been moved from its stand and the small change taken from it; that the back door of the store was open; that there were marks in the wood of the door where some tool had been used to jimmy the doors; and that a considerable quantity of merchandise was missing from the store. He itemized the missing articles and fixed their combined value at between $200 and $400, with a minimum value of $200 (R. 13-15). He further testified that the defendant, in company with a man later identified as A. R. Haskins, had entered his store on Saturday afternoon, January 29, 1955, approximately 35 hours prior to the burglary, and that Haskins had bought a pair of coveralls (R. 16).

Mildred Andrew has been a resident of Richmond for 21 years. She testified that on Saturday afternoon, January 29, 1955, she noticed two strangers in a car in the driveway between Theurer's Store and the adjoining store (R. 24). They looked suspicious to her and she took down the license number—Utah 1954, LM 808. She identified the defendant as one of the occupants of the car.

Vada Spackman was the operator on duty at the Telephone Company during the night of January 30-31, 1955. She testified that shortly after 3:00 a. m. a car, with its

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headlights on, came up the street in front of Theurer's Store. It stopped, turned its headlights off and backed into the alley adjoining Theurer's Store. Four or five minutes later the car emerged from the alley with its headlights on, turned down the street and drove out of town. Her suspicions were aroused and she phoned Mark Theurer. She described the car as light in color.

Deloy Ward testified that he was the employee of an automobile rental agency in Ogden, Utah; that his company owned a 1955 Chevrolet, light blue in color, with an ivory top; that this car carried 1954 Utah license tags, number LM 808; and that one A. R. Haskins rented the car at 9:00 a. m. on January 27, 1955 (R. 34-40). He stated that Haskins, with the defendant in the front seat beside him, drove into the agency the following day and renewed the rental. He saw the defendant with Haskins again on January 30, 1955, on which occasion they again renewed the car rental.

Billy J. Lamrose, also an employee of the automobile rental agency, testified that an additional deposit was required of the two men when they renewed the car rental on January 30, and that the defendant supplied the required collateral by giving his check for $50 (R. 43).

It was stipulated at the beginning of the defendant's case that A. R. Haskins, originally a co-defendant in this case, had pleaded guilty to burglarizing Theurer's Store.

The ticket clerk at the Greyhound Bus Station in Ogden, Utah, testified that on Monday, January 31, 1955, both the defendant and Haskins bought bus tickets to Boise,

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Idaho; that Haskins checked three pieces of luggage to that city and that the defendant checked three pieces of luggage to Twin Falls. The clerk identified Exhibits 6, 7 and 8 as the luggage checked by Haskins and Exhibits 3, 4 and 5 as that checked by the defendant Little. He stated that the two men stood together in the bus station and conversed as they waited for the 2:25 bus to Boise (R. 46, 54). The chain of custody of the luggage checked by Haskins (Exhibits 6, 7 and 8) was established through the testimony of various witnesses (R. 55, 58, 63, 70, 73). Mark Theurer then resumed the witness stand and testified that Exhibit 8, a leather bag, was the same type of bag as those taken from his store in the burglary. He identified the articles contained in Exhibits 6, 7 and 8, one by one, thoroughly and painstakingly, and stated they were all taken from his store in the burglary (R. 77-83). The Chief of Police of Twin Falls, Howard Gillette, testified that following the defendant's arrest, he placed his personal belongings in a paper envelope and turned the envelope over to Wesley Malmberg, Sheriff of Cache County, Utah (R. 148). He later testified that a key, Exhibit 15, was among the articles in that envelope and that the key unlocked the bags checked by Haskins to Boise. The key would not unlock any of the bags checked by the defendant to Twin Falls.

The bags which the defendant checked to Twin Falls were removed from the bus station in that city by a police officer (R. 102). The chain of custody was established by various witnesses. Mark Theurer then testified that Exhibit 4 contained a pair of coveralls similar to the pair

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sold to Haskins on Saturday, January 29. The defendant later testified it was the same pair (R. 198). Exhibit 5 contained coins in small denomination. Exhibits 4 and 5 also contained clothing and other personal property belonging to Haskins. Exhibit 3 contained a pinch bar or small wrecking bar (R. 125). This bar was sent to the F. B. I. in Washington, D. C., along with a sample of wood containing bar marks taken from the rear door of Theurer's Store. A specialist from the F. B. I., trained extensively in physics, chemistry and spectrographic analysis, testified that the bar showed smears of paint consisting of four layers which were identical in color, texture and composition with four layers of paint found on the wood sample. He further stated that the wood sample had upon it a blue-green smear of paint of the same color and texture as the paint covering on the bar.

After witnessing Haskins' arrest, the defendant placed a phone call to Eva Boisseau in Boise, Idaho. He told her he was mailing some claim checks to her and sending his luggage through to Boise, and asked her to take care of it for him (R. 61). She received the baggage checks through the mail and they were later picked up by Lieutenant Boor of the Boise Police (R. 110). The numbers on those claim checks corresponded with the numbers on the claim checks attached to the luggage which the defendant had checked to Twin Falls.

Police Chief Gillette testified that the defendant attempted to escape from the Twin Falls City Jail by removing the steel mesh from around the transom of the room in which he was confined (R. 97). An admission made

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by the defendant concerning the escape attempt was also testified to by the Chief of Police.

The defendant took the stand in his own behalf. His credibility suffered some impairment at the outset when he disclosed that he was first convicted of a felony as a juvenile some twenty years previously and that he had since been convicted of forgery, robbery and attempted assault. On direct examination, he denied complicity in the burglary charged. Although he admitted certain facts previously put in evidence by the prosecution, he attempted to explain away the more damaging parts of the State's case. In the latter category is his testimony that he had checked one piece of luggage, Exhibit 3, at the bus station on the day of the robbery only at Haskins' request and as an accommodation to him, and that he had no knowledge of its contents. In rebuttal, the State called Deputy Sheriff Alma Sorenson, who testified that the defendant, while in jail awaiting trial, had requested access to his personal belongings. Upon receiving them, he extracted from among them a piece of paper which he doubled up, tore once or twice and threw into the waste basket (R. 231). This paper contained a list of items which, in the hands of a careless person, could be used to blow a safe. Among the contents of Exhibit 3 were articles which corresponded, item for item with the list (R. 241).

The defendant maintains that no evidence was produced at the trial connecting him with the offenses charged. In summary, the record shows:

(1) that A. R. Haskins pleaded guilty to burglarizing Theurer's Store on January 31, 1955;

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(2) that Haskins and the defendant were closely associated in all their activities prior to the burglary;

(3) that Haskins and the defendant were seen shortly after the burglary in company with each other on the streets of Ogden, Utah, and specifically in the Ogden bus station;

(4) that Haskins and the defendant purchased bus tickets to the same city;

(5) that the defendant carried on his person the key to luggage which contained loot from the burglary and was checked by Haskins to Boise, Idaho;

(6) that within a few hours of the burglary, the defendant checked luggage to Twin Falls, Idaho, which contained personal property belonging to Haskins;

(7) that in the luggage checked by the defendant, and for which he held claim checks, was a wrecking bar which was used to break into the burglarized store;

(8) that the defendant gave his check in advance payment of rental on the car used in the burglary;

(9) that the defendant attempted to escape from confinement following his arrest; and

(10) that the defendant's credibility was seriously impeached and the explanations offered by him were wholly improbable and unworthy of belief.

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POINT II

THE DEFENDANT WAS NOT DENIED DUE PROCESS OF LAW.

There is no merit in the defendant's claim that the identification of Haskins by prosecution witnesses and the admission of evidence pertaining to his activities denied this defendant due process. The rule, as stated in Wharton's Criminal Evidence, 11th Edition, Section 699, is:

> "* * * that where several persons are proved to have acted in concert in the commission of a crime, and have thus combined for the same unlawful purpose, the acts and declarations of one co-actor in pursuance of the common act or design are admissible against any other co-actor on trial for the crime."

The Utah decisions are in agreement. *State* v. *Inlow*, 44 Utah 485, 141 P. 530; *State* v. *McCurtain*, 52 Utah 63, 172 P. 481. That being so, the State had the right to show Haskins' identity by its witnesses and to adduce evidence that he and the defendant were co-actors in the commission of the crimes charged in the information. In so doing, it abridged no right of the defendant. *State* v. *Shive*, 59 Kan. 780, 54 P. 1061; *State* v. *Hyde*, 22 Wash. 551, 61 P. 719; *Jamerson* v. *United States*, 66 F. 2d 569, Cert. den., 290 U. S. 706, 54 Sup. Ct. 373, 78 L. Ed. 606. Nor was it error to admit evidence concerning Haskins' possession of stolen goods since there was substantial evidence that he and the defendant acted jointly in committing these offenses, and if the jury so found, then the possession of Haskins was the

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possession of the defendant. *State* v. *Crawford*, 59 Utah 39, 201 P. 1030, 1033; *State* v. *Morris*, 70 Utah 570, 262 P. 107, 110.

POINT III

UTAH CODE ANNOTATED, 1953, SECTION 76-38-1, UNDER WHICH THE DEFENDANT WAS CONVICTED OF GRAND LARCENY, IS NOT UNCONSTITUTIONAL.

This statute reads:

> "Larceny is the felonious stealing, taking, carrying, leading or driving away the personal property of another. *Possession of property recently stolen, when the person in possession fails to make a satisfactory explanation, shall be deemed prima facie evidence of guilt.*" (Emphasis added.)

The second sentence, toward which the defendant directs his attack, was enacted by the Legislature in 1905 and has remained unchanged for fifty years. In that length of time, it has been frequently challenged and consistently upheld by this Court.

State v. *Potello*, 40 Utah 56, 119 P. 1023, is apparently the first decision dealing with the "recent possession" clause. The defendant in that case maintained that the statute was unconstitutional as an encroachment by the Legislature upon the prerogative of the judiciary. This Honorable Court rejected that contention and pointed out that the established rule is that the Legislature has the power to declare that certain facts shall be prima facie evi-

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dence of another substantive fact if there is a fair relation between the two. At the same term of court, the *Potello* holding was confirmed in the case of *State* v. *Converse,* 40 Utah 72, 119 P. 1030.

The validity of this statute has been recently reaffirmed in the cases of *State* v. *Wood,* 2 Utah 2d, 34, 268 P. 2d 998, and *State* v. *Thomas,* . . . Utah . . ., 244 P. 2d 653. In the latter case this Court held that unexplained possession of recently stolen property is evidence not only on the larceny thereof, but also of a related burglary where it appears from the facts in evidence that the larceny could not have been committed independently of the burglary.

Between the *Potello* and *Thomas Cases* are a host of decisions which affirm, either directly or by unescapable inference, the validity of the statute in question here. Representative of those cases are *State* v. *Laris,* 78 Utah 183, 2 P. 2d 243; *State* v. *Brooks,* 101 Utah 584, 126 P. 2d 1044; and *State* v. *Dyett,* 114 Utah 379, 199 P. 2d 155. To cite further authority for a doctrine which this Honorable Court has so often expounded seems unnecessary at this point. It is too late to assail a statute which so well reflects wise public policy and is so firmly established in our criminal law.

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CONCLUSION

This defendant was convicted of the offenses charged in a fair and impartial trial in which every right accorded him by law was safeguarded. He had, on this appeal, shown no reason why his conviction should not stand. The judgment of the lower court should therefore be affirmed.

Respectfully submitted,

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